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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MCCARTHY,

Plaintiff,

v.

RAF, INC., d.b.a. DOWNTOWN
AUTO CENTER a.k.a. DOWNTOWN
TOYOTA SUBARU SAAB; RALPH A.
FATTORE d.b.a. DOWNTOWN AUTO
CENTER a.k.a. DOWNTOWN TOYOTA
SUBARU SAAB; RAF, INC.; RALPH
A. FATTORE; PATTERSON RANCH,
INC.; And DOES 1 THROUGH 10,
Inclusive

Defendants.

C No.

06 1265

CIVIL COMPLAINT:

DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS

[42 U.S.C. 12182(a) ET. SEQ;
CIVIL CODE 51, 52, 54, 54.1]

NEGLIGENCE

[CIVIL CODE 1714(a), 2338,
3333; EVIDENCE CODE 669(a)]

DEMAND FOR JURY TRIAL

[F.R.Civ.P. rule 38(b)]

INTRODUCTION

Plaintiff ROBERT MCCARTHY herein complain, by filing this
Civil Complaint in accordance with rule 8 of the Federal Rules of
Civil Procedure in the Judicial District of the United States
District Court of the Northern District of California, that
Defendants have in the past, and presently are, engaging in

1 discriminatory practices against individuals with disabilities,
2 specifically including minorities with disabilities. Plaintiff
3 alleges this civil action and others substantial similar thereto
4 are necessary to compel access compliance because empirical
5 research on the effectiveness of Title III of the Americans with
6 Disabilities Act indicates this Title has failed to achieve full
7 and equal access simply by the executive branch of the Federal
8 Government funding and promoting voluntary compliance efforts.
9 Further, empirical research shows when individuals with
10 disabilities give actual notice of potential access problems to
11 places of public accommodation without a federal civil rights
12 action, the public accommodations do not remove the access
13 barriers. Therefore, Plaintiff makes the following allegations in
14 this federal civil rights action:

15 JURISDICTION AND VENUE

16 1. The federal jurisdiction of this action is based on the
17 Americans with Disabilities Act, 42 United States Code 12101-
18 12102, 12181-12183 and 12201, et seq. Venue in the Judicial
19 District of the United States District Court of the Northern
20 District of California is in accordance with 28 U.S.C. § 1391(b)
21 because a substantial part of Plaintiff's claims arose within the
22 Judicial District of the United States District Court of the
23 Northern District of California.

24 INTRADISTRICT ASSIGNMENT

25 2. Pursuant to Local Rule 3-2, this action should be assigned to
26 the San Francisco Division as the property that is the subject of
27 this action is situated in Alameda County.
28

3. The Judicial District of the United States District Court of the Northern District of California has supplemental jurisdiction over the state claims as alleged in this Complaint pursuant to 28 U.S.C. § 1367(a). The reason supplemental jurisdiction is proper in this action is because all the causes of action or claims derived from federal law and those arising under state law, as herein alleged, arose from common nucleus of operative facts. The common nucleus of operative facts, include, but are not limited to, the incidents where Plaintiff was denied full and equal access to Defendants' facilities, goods, and/or services in violation of both federal and state laws when Plaintiff ROBERT MCCARTHY attempted to enter, use, and/or exit Defendants' facilities as described below within this Complaint. Further, due to this denial of full and equal access, Plaintiff ROBERT MCCARTHY and other persons with disabilities were injured. Based upon the said allegations, the state actions, as stated herein, are so related to the federal actions that they form part of the same case or controversy and the actions would ordinarily be expected to be tried in one judicial proceeding.

4. Defendants are, and, at all times mentioned herein, were, a business or corporation or franchise organized and existing and/or doing business under the laws of the State of California.

Defendants RAF, INC., d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB and RALPH A. FATTORE d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB are located at 4145

1 Broadway, Oakland, California, 94611. Plaintiff is informed and
2 believes and thereon alleges that Defendants RAF, INC., and RALPH
3 A. FATTORE are the owners, operators, franchisees, and/or lessors
4 of the DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB.
5 Defendants RAF, INC., and RALPH A. FATTORE are located at 121
6 Sugar Creek Lane, Alamo, California, 94507. Plaintiff is informed
7 and believes and thereon alleges that Defendant PATTERSON RANCH,
8 INC., is the owner, operator, and/or lessor of the real property
9 located at 4145 Broadway, Oakland, California, 94611, Assessor
10 Parcel Number 012-1001-014-02. Defendant PATTERSON RANCH, INC.,
11 is located at 3493 Silver Springs Road, Lafayette, California,
12 94549.

13 5. The words Plaintiff and Plaintiffs as used herein
14 specifically include ROBERT MCCARTHY and persons associated with
15 ROBERT MCCARTHY who accompanied him to Defendants' facilities.

16 6. Defendants Does 1 through 10, were at all times relevant
17 herein subsidiaries, employers, employees, agents, of RAF, INC.,
18 d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB;
19 RALPH A. FATTORE d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN
20 TOYOTA SUBARU SAAB; RAF, INC.; RALPH A. FATTORE; and/or PATTERSON
21 RANCH, INC. Plaintiff is ignorant of the true names and
22 capacities of Defendants sued herein as Does 1 through 10,
23 inclusive, and therefore sue these Defendants by such fictitious
24 names. Plaintiff will pray leave of the court to amend this
25 complaint to allege the true names and capacities of the Does when
26 ascertained.

27 7. Plaintiff is informed and believes, and thereon alleges, that
28

1 Defendants and each of them herein were, at all times relevant to
2 the action, the owner, lessor, lessee, franchiser, franchisee,
3 general partner, limited partner, agent, employee, representing
4 partner, or joint venturer of the remaining Defendants and were
5 acting within the course and scope of that relationship.

6 Plaintiff is further informed and believes, and thereon alleges,
7 that each of the Defendants herein gave consent to, ratified,
8 and/or authorized the acts alleged herein to each of the remaining
9 Defendants.
10

11
12 CONCISE SET OF FACTS

13 8. Plaintiff ROBERT MCCARTHY has an impairment and due to this
14 impairment he has learned to successfully operate a wheelchair.

15 9. On January 20, 2006, Plaintiff ROBERT MCCARTHY went to
16 Defendants' RAF, INC., d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN
17 TOYOTA SUBARU SAAB and RALPH A. FATTORE d.b.a. DOWNTOWN AUTO
18 CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB (hereinafter referred to
19 as "DOWNTOWN AUTO CENTER") facilities to utilize their goods
20 and/or services. When Plaintiff ROBERT MCCARTHY patronized
21 Defendants' facilities, he was unable to use and/or had difficulty
22 using the public accommodations' disabled parking, exterior path
23 of travel, access ramp, entrance, counter, and restroom facilities
24 at Defendants' DOWNTOWN AUTO CENTER business establishment because
25 they failed to comply with ADA Access Guidelines For Buildings and
26 Facilities (hereafter referred to as "ADAAG") and/or California's
27 Title 24 Building Code Requirements. Defendants failed to remove
28 access barriers within the disabled parking, exterior path of

1 travel, access ramp, entrance, counter, and restroom facilities of
2 Defendants' DOWNTOWN AUTO CENTER establishment. Plaintiff ROBERT
3 MCCARTHY intends to return to Defendants' DOWNTOWN AUTO CENTER
4 facilities in the immediate future.

5 10. Plaintiff ROBERT MCCARTHY personally experienced difficulty
6 with said access barriers at Defendants' DOWNTOWN AUTO CENTER
7 facilities. For example, the frontage of Defendants' DOWNTOWN
8 AUTO CENTER establishment abuts a public sidewalk. Plaintiff
9 ROBERT MCCARTHY circled the block twice and could not see off-
10 street parking. There are signs outside of the establishment for
11 "Parts and Service" with arrows pointing to a driveway leading
12 into the building. There fails to be any disabled parking and
13 "Van Accessible" disabled parking at this establishment.

14 11. Plaintiff ROBERT MCCARTHY pulled into the building and parked
15 in one (1) of the narrow vehicular lanes. There failed to be
16 enough room for Plaintiff ROBERT MCCARTHY to exit his vehicle with
17 his wheelchair. A Service Department employee approached
18 Plaintiff ROBERT MCCARTHY and Plaintiff ROBERT MCCARTHY explained
19 to the employee his dilemma of not being able to exit his vehicle.
20 Plaintiff ROBERT MCCARTHY inquired if there was a larger parking
21 space for him to park his vehicle by taking up two (2) parking
22 spaces. Plaintiff ROBERT MCCARTHY was informed that there was not
23 a larger parking space for him to park his vehicle. Plaintiff
24 ROBERT MCCARTHY was informed he would have to move his vehicle and
25 use the outside on-street public parking. Plaintiff ROBERT
26 MCCARTHY did see another patron of Defendants' establishment park
27 in this parking area and walk into the Parts Department.
28

1 12. There are two (2) distinct glass and chrome front doors
2 leading into Defendants' dealership from the public sidewalk.
3 Each door is located up a ramp that fails to have a flat exterior
4 surface near the door. Plaintiff ROBERT MCCARTHY entered through
5 the west door, nearest to the Service and Parts Departments.
6 Plaintiff ROBERT MCCARTHY had extreme difficulties in opening this
7 door, as there is a backward slant to the access ramp. Also, this
8 door fails to have the required maneuvering room between the wall
9 of the ramp and the entrance door handle. This entrance door also
10 has a very low bottom rail and a low doorstopper on the inside
11 bottom corner of the door. As a result of these architectural
12 barriers, the right big wheel of Plaintiff ROBERT MCCARTHY's
13 wheelchair snagged on the low door stopper of this door as he
14 attempted to pass through this entrance door. Both of the
15 entrance doors fail to have the required disability signage.
16 Later, when Plaintiff ROBERT MCCARTHY exited the building via this
17 doorway, the door was propped open. Leaving the Sales Department
18 and heading toward the Parts Department, Plaintiff ROBERT MCCARTHY
19 traveled through the service counter enclosure, which is the most
20 direct route, instead of around the enclosure and into a vehicular
21 traffic lane. There is a sliding door at each end of the
22 enclosure, both of which are extremely narrow at approximately
23 twenty-six inches to twenty-eight inches (26" to 28") wide. The
24 door openings are so narrow that Plaintiff ROBERT MCCARTHY scraped
25 three (3) knuckles on his right hand attempting to pass through
26 these doors.
27

28 13. The counter in the Parts Department is too high to be

1 accessible, as it is forty-eight inches (48") high. Plaintiff
2 ROBERT MCCARTHY experienced extreme difficulty in reaching over
3 the high parts counter to receive his purchase of a Toyota van air
4 filter. Around the corner, at a separate counter, Plaintiff
5 ROBERT MCCARTHY had difficulty at the high cashier counter. This
6 counter is forty-two inches (42") above the finished floor.
7 Plaintiff ROBERT MCCARTHY was forced to sign his credit card
8 transaction slip on the air filter box, as no clipboard was
9 offered.

10 14. Returning to the showroom area, Plaintiff ROBERT MCCARTHY
11 traveled around the service counter enclosure. Plaintiff ROBERT
12 MCCARTHY asked a salesman, Johnny Julio Wong, if he could use the
13 restroom. Mr. Wong informed Plaintiff ROBERT MCCARTHY that the
14 customer restroom is located on the second floor of the building
15 and that there is no elevator access to the second floor. Mr.
16 Wong directed and escorted Plaintiff ROBERT MCCARTHY to the Subaru
17 showroom, which has a restroom located on the first floor.

18 15. Down the sidewalk, at the Subaru dealership area, Plaintiff
19 ROBERT MCCARTHY located a unisex restroom with a wheelchair
20 accessible sign. Plaintiff ROBERT MCCARTHY was precluded from
21 locking the unisex restroom entrance door, as the locking
22 mechanism is a small, round lock that requires tight grasping
23 and/or twisting of the wrist to operate. The commode blocks the
24 commode seat protective cover dispenser and the commode seat
25 protective cover dispenser is mounted too high to be accessible.
26 As a result, Plaintiff ROBERT MCCARTHY was precluded from reaching
27 the commode seat protective covers. Plaintiff ROBERT MCCARTHY
28

1 found it impossible to transfer from his wheelchair to commode, as
2 the commode is located too far away from the sidewall and the
3 existing grab bars. This commode is twenty-three inches (23")
4 from the sidewall and the grab bars. There fails to be sufficient
5 knee clearance under the lavatory sink due to the existence of a
6 large water filter. As a result, Plaintiff ROBERT MCCARTHY was
7 precluded from pushing forward towards the lavatory sink. The
8 liquid soap dispenser is mounted too high on the wall above the
9 sink and, therefore, fails to be accessible. Plaintiff ROBERT
10 MCCARTHY had extreme difficulty reaching one (1) of the paper
11 towel dispensers, as the dispenser is mounted forty-seven inches
12 (47") above the floor. The other existing paper towel dispenser
13 is mounted even higher at fifty-eight inches to sixty inches (58"
14 to 60") above the floor. The bottom edge of the mirror is also
15 too high to be accessible.

16 16. Plaintiff ROBERT MCCARTHY SPOKE TO Mr. Steve Litwin at the
17 Subaru showroom area. As Plaintiff ROBERT MCCARTHY was exiting
18 the building, Plaintiff ROBERT MCCARTHY had difficulty with the
19 low bottom rail of the metal-framed entrance/exit doors. Also,
20 this entrance/exit door fails to have the required disability
21 signage.

22 17. Plaintiff ROBERT MCCARTHY is presently deterred from
23 returning due to his knowledge of the barriers to access that
24 exist at Defendants' DOWNTOWN AUTO CENTER facilities.

25 18. Pursuant to federal and state law, Defendants are required to
26 remove barriers to their existing facilities. Further, Defendants
27 had actual knowledge of their barrier removal duties under the
28

1 Americans with Disabilities Act and the Civil Code before January
2 26, 1992. Also, Defendants should have known that individuals
3 with disabilities are not required to give notice to a
4 governmental agency before filing suit alleging Defendants failed
5 to remove architectural barriers.

6 19. Plaintiff believes and herein alleges Defendants' DOWNTOWN
7 AUTO CENTER facilities have access violations not directly
8 experienced by Plaintiff ROBERT MCCARTHY which preclude or limit
9 access by other persons with disabilities, including but not
10 limited to violations relating to Space Allowance and Reach
11 Ranges, Accessible Route, Protruding Objects, Ground and Floor
12 Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps,
13 Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows,
14 Doors, Entrances, Drinking Fountains and Water Coolers, Water
15 Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks,
16 Storage, Handrails, Grab Bars, and Controls and Operating
17 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.
18 Accordingly, Plaintiff alleges Defendants are required to remove
19 all architectural barriers, known or unknown. Also, Plaintiff
20 alleges Defendants are required to utilize the ADA checklist for
21 Readily Achievable Barrier Removal approved by the United States
22 Department of Justice and created by Adaptive Environments.

23 20. Based on these facts, Plaintiff ROBERT MCCARTHY alleges he
24 was discriminated against each time he patronized Defendants'
25 DOWNTOWN AUTO CENTER establishment. Plaintiff ROBERT MCCARTHY was
26 extremely upset due to Defendants' conduct. Further, Plaintiff
27 ROBERT MCCARTHY experienced pain in his legs, back, arms,
28

1 shoulders and wrists when he attempted to enter, use, and exit
2 Defendants' facilities.

3 NOTICE

4 21. Plaintiff is not required to provide notice to the defendants
5 prior to filing a complaint. *Botosan v. Paul McNally Realty*, 216
6 F.3d 827, 832 (9th Cir 2000).
7

8 WHAT CLAIMS IS PLAINTIFF ALLEGING AGAINST EACH NAMED DEFENDANT

9 22. RAF, INC., d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN
10 TOYOTA SUBARU SAAB; RALPH A. FATTORE d.b.a. DOWNTOWN AUTO CENTER
11 a.k.a. DOWNTOWN TOYOTA SUBARU SAAB; RAF, INC.; RALPH A. FATTORE;
12 PATTERSON RANCH, INC.; and Does 1 through 10 will be referred to
13 collectively hereinafter as "Defendants."
14

15 23. Plaintiff avers that the Defendants are liable for the
16 following claims as alleged below:

17 DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS

18 FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- Claims Under The
19 Americans With Disabilities Act of 1990

20 CLAIM I AGAINST ALL DEFENDANTS: Denial Of Full And Equal Access

21 24. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in
22 this complaint, Plaintiff ROBERT MCCARTHY was denied full and
23 equal access to Defendants' goods, services, facilities,
24 privileges, advantages, or accommodations. Plaintiff alleges
25 Defendants are a public accommodation owned, leased and/or
26 operated by Defendants. Defendants' existing facilities and/or
27 services failed to provide full and equal access to Defendants'
28 facility as required by 42 U.S.C. § 12182(a). Thus, Plaintiff

1 ROBERT MCCARTHY was subjected to discrimination in violation of 42
2 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188
3 because Plaintiff ROBERT MCCARTHY was denied equal access to
4 Defendants' existing facilities.

5 25. Plaintiff ROBERT MCCARTHY has physical impairments as alleged
6 in ¶ 8 above because his conditions affect one or more of the
7 following body systems: neurological, musculoskeletal, special
8 sense organs, and/or cardiovascular. Further, Plaintiff ROBERT
9 MCCARTHY's said physical impairments substantially limits one or
10 more of the following major life activities: walking. In
11 addition, Plaintiff ROBERT MCCARTHY cannot perform one or more of
12 the said major life activities in the manner, speed, and duration
13 when compared to the average person. Moreover, Plaintiff ROBERT
14 MCCARTHY has a history of or has been classified as having a
15 physical impairment as required by 42 U.S.C. § 12102(2)(A).
16

17 CLAIM II AGAINST ALL DEFENDANTS: Failure To Make Alterations In
18 Such A Manner That The Altered Portions Of The Facility Are
19 Readily Accessible And Usable By Individuals With Disabilities

20 26. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in
21 this complaint, Plaintiff ROBERT MCCARTHY was denied full and
22 equal access to Defendants' goods, services, facilities,
23 privileges, advantages, or accommodations within a public
24 accommodation owned, leased, and/or operated by Defendants.
25 Defendants altered their facility in a manner that affects or
26 could affect the usability of the facility or a part of the
27 facility after January 26, 1992. In performing the alteration,
28 Defendants failed to make the alteration in such a manner that, to

1 the maximum extent feasible, the altered portions of the facility
2 are readily accessible to and usable by individuals with
3 disabilities, including individuals who use wheelchairs, in
4 violation of 42 U.S.C. §12183(a)(2).

5 27. Additionally, the Defendants undertook an alteration that
6 affects or could affect the usability of or access to an area of
7 the facility containing a primary function after January 26, 1992.
8 Defendants further failed to make the alterations in such a manner
9 that, to the maximum extent feasible, the path of travel to the
10 altered area and the bathrooms, telephones, and drinking fountains
11 serving the altered area, are readily accessible to and usable by
12 individuals with disabilities in violation 42 U.S.C. §12183(a)(2).

13 28. Pursuant to 42 U.S.C. §12183(a), this failure to make the
14 alterations in a manner that, to the maximum extent feasible, are
15 readily accessible to and usable by individuals with disabilities
16 constitutes discrimination for purposes of 42 U.S.C. §12183(a).
17 Therefore, Defendants discriminated against Plaintiff in violation
18 of 42 U.S.C. § 12182(a).

19 29. Thus, Plaintiff ROBERT MCCARTHY was subjected to
20 discrimination in violation of 42 U.S.C. § 12183(a), 42 U.S.C.
21 §12182(a) and 42 U.S.C. §12188 because Plaintiff ROBERT MCCARTHY
22 was denied equal access to Defendants' existing facilities.
23

24 CLAIM III AGAINST ALL DEFENDANTS: Failure To Remove Architectural
25 Barriers

26 30. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in
27 this complaint, Plaintiff ROBERT MCCARTHY was denied full and
28 equal access to Defendants' goods, services, facilities,

1 privileges, advantages, or accommodations within a public
2 accommodation owned, leased, and/or operated by Defendants.
3 Defendants failed to remove barriers as required by 42 U.S.C. §
4 12182(a). Plaintiff is informed, believes, and thus alleges that
5 architectural barriers which are structural in nature exist within
6 the following physical elements of Defendants' facilities: Space
7 Allowance and Reach Ranges, Accessible Route, Protruding Objects,
8 Ground and Floor Surfaces, Parking and Passenger Loading Zones,
9 Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair
10 Lifts), Windows, Doors, Entrances, Drinking Fountains and Water
11 Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and
12 Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls and
13 Operating Mechanisms, Alarms, Detectable Warnings, Signage, and
14 Telephones. Title III requires places of public accommodation to
15 remove architectural barriers that are structural in nature to
16 existing facilities. [See, 42 United States Code
17 12182(b)(2)(A)(iv).] Failure to remove such barriers and
18 disparate treatment against a person who has a known association
19 with a person with a disability are forms of discrimination. [See
20 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT
21 MCCARTHY was subjected to discrimination in violation of 42 United
22 States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because he
23 was denied equal access to Defendants' existing facilities.
24

25 CLAIM IV AGAINST ALL DEFENDANTS: Failure To Modify Practices,
26 Policies And Procedures

27 31. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in
28 this complaint, Defendants failed and refused to provide a

1 reasonable alternative by modifying its practices, policies and
2 procedures in that they failed to have a scheme, plan, or design
3 to assist Plaintiff and/or others similarly situated in entering
4 and utilizing Defendants' services, as required by 42 U.S.C. §
5 12188(a). Thus, Plaintiff ROBERT MCCARTHY was subjected to
6 discrimination in violation of 42 United States Code
7 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT
8 MCCARTHY was denied equal access to Defendants' existing
9 facilities.

10 32. Based on the facts plead at ¶¶ 7 - 20 above, Claims I, II,
11 and III of Plaintiff's First Cause Of Action above, and the facts
12 elsewhere herein this complaint, Plaintiff will suffer irreparable
13 harm unless Defendants are ordered to remove architectural, non-
14 architectural, and communication barriers at Defendants' public
15 accommodation. Plaintiff alleges that Defendants' discriminatory
16 conduct is capable of repetition, and this discriminatory
17 repetition adversely impacts Plaintiff and a substantial segment
18 of the disability community. Plaintiff alleges there is a
19 national public interest in requiring accessibility in places of
20 public accommodation. Plaintiff has no adequate remedy at law to
21 redress the discriminatory conduct of Defendants. Plaintiff
22 desires to return to Defendants' places of business in the
23 immediate future. Accordingly, the Plaintiff alleges that a
24 structural or mandatory injunction is necessary to enjoin
25 compliance with federal civil rights laws enacted for the benefit
26 of individuals with disabilities.

27
28 33. WHEREFORE, Plaintiff prays for judgment and relief as

hereinafter set forth.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - CLAIMS UNDER CALIFORNIA ACCESSIBILITY LAWS

CLAIM I: Denial Of Full And Equal Access

34. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in this complaint, Plaintiff ROBERT MCCARTHY was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility violated California's Title 24 Accessible Building Code by failing to provide access to Defendants' facilities due to violations pertaining to the Space Allowance and Reach Ranges, Accessible Route, Protruding Objects, Ground and Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains and Water Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls and Operating Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

35. These violations denied Plaintiff ROBERT MCCARTHY full and equal access to Defendants' facility. Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff ROBERT MCCARTHY was denied full, equal and safe access to Defendants' facility, causing severe emotional distress.

///

CLAIM II: Failure To Modify Practices, Policies And Procedures

36. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere herein this complaint, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies, and procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1. Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of Civil Code § 54.1.

CLAIM III: Violation Of The Unruh Act

37. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere herein this complaint and because Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code § 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to discriminate against Plaintiff and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.

38. Based on the facts plead at ¶¶ 7 - 20 above, Claims I, II, and III of Plaintiff's Second Cause Of Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable harm unless Defendants are ordered to remove architectural, non-architectural, and communication barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a substantial segment of the disability community. Plaintiff alleges there is a state and national public interest in requiring accessibility in places

1 of public accommodation. Plaintiff has no adequate remedy at law
2 to redress the discriminatory conduct of Defendants. Plaintiff
3 desires to return to Defendants' places of business in the
4 immediate future. Accordingly, the Plaintiff alleges that a
5 structural or mandatory injunction is necessary to enjoin
6 compliance with state civil rights laws enacted for the benefit of
7 individuals with disabilities.

8 39. Wherefore, Plaintiff prays for damages and relief as
9 hereinafter stated.
10

11 **Treble Damages Pursuant To Claims I, II, III Under The California**
12 **Accessibility Laws**

13 40. Defendants, each of them respectively, at times prior to and
14 including, the month of January, 2006, and continuing to the
15 present time, knew that persons with physical disabilities were
16 denied their rights of equal access to all portions of this public
17 facility. Despite such knowledge, Defendants, and each of them,
18 failed and refused to take steps to comply with the applicable
19 access statutes; and despite knowledge of the resulting problems
20 and denial of civil rights thereby suffered by Plaintiff and other
21 similarly situated persons with disabilities. Defendants, and
22 each of them, have failed and refused to take action to grant full
23 and equal access to persons with physical disabilities in the
24 respects complained of hereinabove. Defendants, and each of them,
25 have carried out a course of conduct of refusing to respond to, or
26 correct complaints about, denial of disabled access and have
27 refused to comply with their legal obligations to make Defendants'
28 DOWNTOWN AUTO CENTER facilities accessible pursuant to the

1 Americans With Disability Act Access Guidelines (ADAAG) and Title
2 24 of the California Code of Regulations (also known as the
3 California Building Code). Such actions and continuing course of
4 conduct by Defendants, and each of them, evidence despicable
5 conduct in conscious disregard of the rights and/or safety of
6 Plaintiff and of other similarly situated persons, justifying an
7 award of treble damages pursuant to sections 52(a) and 54.3(a) of
8 the California Civil Code.

9
10 41. Defendants, and each of their actions have also been
11 oppressive to persons with physical disabilities and of other
12 members of the public, and have evidenced actual or implied
13 malicious intent toward those members of the public, such as
14 Plaintiff and other persons with physical disabilities who have
15 been denied the proper access to which they are entitled by law.
16 Further, Defendants, and each of their, refusals on a day-to-day
17 basis to correct these problems evidence despicable conduct in
18 conscious disregard for the rights of Plaintiff and other members
19 of the public with physical disabilities.

20 42. Plaintiff prays for an award of treble damages against
21 Defendants, and each of them, pursuant to California Civil Code
22 sections 52(a) and 54.3(a), in an amount sufficient to make a more
23 profound example of Defendants and encourage owners, lessors, and
24 operators of other public facilities from willful disregard of the
25 rights of persons with disabilities. Plaintiff does not know the
26 financial worth of Defendants, or the amount of damages sufficient
27 to accomplish the public purposes of section 52(a) of the
28 California Civil Code and section 54.3 of the California Civil

1 Code.

2 43. Wherefore, Plaintiff prays for damages and relief as
3 hereinafter stated.

4
5 THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS- Negligence.

6 44. Based on the facts plead at ¶¶ 7 - 20 above and elsewhere in
7 this complaint, Defendants owed Plaintiff ROBERT MCCARTHY a
8 statutory duty to make their facility accessible and owed
9 Plaintiff ROBERT MCCARTHY a duty to keep him reasonably safe from
10 known dangers and risks of harm. This said duty arises by virtue
11 of legal duties proscribed by various federal and state statutes
12 including, but not limited to, ADA, ADAAG, Civil Code 51, 52, 54,
13 54.1 and Title 24 of the California Administrative Code and
14 applicable 1982 Uniform Building Code standards as amended.

15 45. Title III of the ADA mandates removal of architectural
16 barriers and prohibits disability discrimination. As well,
17 Defendants' facility, and other goods, services, and/or facilities
18 provided to the public by Defendants are not accessible to and
19 usable by persons with disabilities as required by Health and
20 Safety Code § 19955 which requires private entities to make their
21 facility accessible before and after remodeling, and to remove
22 architectural barriers.

23 46. Therefore, Defendants engaged in discriminatory conduct in
24 that they failed to comply with known duties under the ADA, ADAAG,
25 Civil Code 51, 52, 54, 54.1, 54.3, ADAAG, and Title 24, and knew
26 or should have known that their acts of nonfeasance would cause
27 Plaintiff ROBERT MCCARTHY emotional, bodily and personal injury.
28 Plaintiff ROBERT MCCARTHY further alleges that such conduct was

1 done in reckless disregard of the probability of said conduct
2 causing Plaintiff ROBERT MCCARTHY to suffer bodily or personal
3 injury, anger, embarrassment, depression, anxiety, mortification,
4 humiliation, distress, and fear of physical injury. Plaintiff
5 ROBERT MCCARTHY alleges that such conduct caused him to suffer the
6 injuries of mental and emotional distress, including, but not
7 limited to, anger, embarrassment, depression, anxiety,
8 mortification, humiliation, distress, and fear of physical injury.
9 Further, Plaintiff ROBERT MCCARTHY experienced pain in his legs,
10 back, arms, shoulders and wrists when he attempted to enter, use,
11 and exit Defendants' facilities. Plaintiff ROBERT MCCARTHY
12 additionally alleges that such conduct caused him to suffer
13 damages as a result of these injuries.
14

15 47. Wherefore, Plaintiff ROBERT MCCARTHY prays for damages and
16 relief as hereinafter stated.
17
18

19 DEMAND FOR JUDGMENT FOR RELIEF:

20 A. For general damages pursuant to Cal. Civil Code §§ 52, 54.3,
21 3281, and 3333;

22 B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for
23 each and every offense of Civil Code § 51, Title 24 of the
24 California Building Code, ADA, and ADA Accessibility Guidelines;

25 C. In the alternative to the damages pursuant to Cal. Civil
26 Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to
27 Cal. Civil Code § 54.3 for each and every offense of Civil Code §
28 54.1, Title 24 of the California Building Code, ADA, and ADA

1 Accessibility Guidelines;

2 D. For injunctive relief pursuant to 42 U.S.C. § 12188(a) and
3 Cal. Civil Code § 55. Plaintiff requests this Court enjoin

4 Defendants to remove all architectural barriers in, at, or on
5 their facilities related to the following: Space Allowance and
6 Reach Ranges, Accessible Route, Protruding Objects, Ground and
7 Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps,
8 Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts),
9 Windows, Doors, Entrances, Drinking Fountains and Water Coolers,
10 Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors,
11 Sinks, Storage, Handrails, Grab Bars, and Controls and Operating
12 Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

13 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C.
14 § 12205, and Cal. Civil Code §§ 1032 and 1033.5;

15 F. For treble damages pursuant to Cal. Civil Code §§ 52(a),
16 and 54.3(a);

17 G. A Jury Trial and;

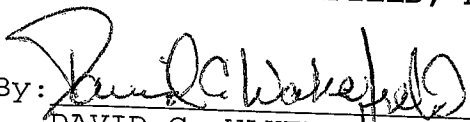
18 H. For such other further relief as the court deems proper.

19 Respectfully submitted:

20 Dated: February 13, 2006

PINNOCK & WAKEFIELD, A.P.C.

21 By:

22 
23 DAVID C. WAKEFIELD, ESQ.
24 MICHELLE L. WAKEFIELD, ESQ.
25 Attorneys for Plaintiff
26
27
28

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

I.(a) PLAINTIFFS

ROBERT MCCARTHY

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

San Diego

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

David C. Wakefield, Esq., SBN: 185736, Pinnock & Wakefield
3033 5th Ave., #410, San Diego, CA 92103, (619) 858-3671

DEFENDANTS

RAF, INC., d.b.a. DOWNTOWN AUTO CENTER a.k.a. DOWNTOWN
TOYOTA SUBARU SAAB; RALPH A. FATTORE d.b.a. DOWNTOWN
AUTO CENTER a.k.a. DOWNTOWN TOYOTA SUBARU SAAB;
RAF, INC.; RALPH A. FATTORE; PATTERSON RANCH, INC.; And
DOES 1 THROUGH 10, Inclusive, Defendants
COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED.

Alameda

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

☐ 1 U.S. Government
Plaintiff

☒ 3 Federal Question
(U.S. Government Not a Party)

☐ 2 U.S. Government
Defendant

☐ 4 Diversity
(Indicate Citizenship of Parties in
Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF
(For diversity cases only) AND ONE BOX FOR DEFENDANT)

Citizen of This State ☐ 1 ☐ 1

Citizen of Another State ☐ 2 ☐ 2

Citizen or Subject of a
Foreign Country ☐ 3 ☐ 3

Incorporated or Principal Place
of Business In This State ☐ 4 ☐ 4

Incorporated and Principal Place
of Business In Another State ☐ 5 ☐ 5

Foreign Nation ☐ 6 ☐ 6

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

☒ Original
Proceeding

☐ Removed from
State Court

☐ Remanded from
Appellate Court

☐ Reinstated or
Reopened

☐ Transferred from
Another district
(specify)

☐ Multidistrict
Litigation

☐ Appeal to District
Judge from Magistrate
Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)**CONTRACT**

- ☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment
& Enforcement of
Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted
Student Loans (Excl
Veterans)
☐ 153 Recovery of Overpayment
of Veteran's Benefits
☐ 160 Stockholders Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability
☐ 196 Franchise

TORTS**PERSONAL INJURY**

- ☐ 310 Airplane
☐ 315 Airplane Product
Liability
☐ 320 Assault Libel &
Slander
☐ 330 Federal Employers
Liability
☐ 340 Marine
☐ 345 Marine Product
Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle
Product Liability
☐ 360 Other Personal Injury

PERSONAL INJURY

- ☐ 362 Personal Injury
Med Malpractice
☐ 365 Personal Injury
Product Liability
☐ 368 Asbestos Personal
Injury Product Liability

PERSONAL PROPERTY

- ☐ 370 Other Fraud
☐ 371 Truth In Lending
☐ 380 Other Personal
Property Damage
☐ 385 Property Damage
Product Liability

FORFEITURE/PENALTY

- ☐ 610 Agriculture
☐ 620 Other Food & Drug
☐ 625 Drug Related Seizure of
Property 21 USC 881
☐ 630 Liquor Laws
☐ 640 RR & Truck
☐ 650 Airline Regs
☐ 660 Occupational
Safety/Health
☐ 690 Other

LABOR

- ☐ 710 Fair Labor Standards Act
☐ 720 Labor/Mgmt Relations
☐ 730 Labor/Mgmt Reporting &
Disclosure Act
☐ 740 Railway Labor Act
☐ 790 Other Labor Litigation
☐ 791 Empl.Ret. Inc. Security
Act

BANKRUPTCY

- ☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS

- ☐ 820 Copyrights
☐ 830 Patent
☐ 840 Trademark

SOCIAL SECURITY

- ☐ 861 HIA (1395ff)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS

- ☐ 870 Taxes (US Plaintiff or
Defendant)
☐ 871 IRS - Third Party
26 USC 7609

OTHER STATUTES

- ☐ 400 State Reapportionment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce/ICC Rates/etc.
☐ 460 Deportation
☐ 470 Racketeer Influenced and
Corrupt Organizations
☐ 810 Selective Service
☐ 850 Securities/Commodities/
Exchange
☐ 875 Customer Challenge
12 USC 3410
☐ 891 Agricultural Acts
☐ 892 Economic Stabilization
Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act
☐ 895 Freedom of Information
Act
☐ 900 Appeal of Fee
Determination Under
Equal Access to Justice
☐ 950 Constitutionality of State
Statutes
☐ 890 Other Statutory Actions

REAL PROPERTY

- ☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

CIVIL RIGHTS

- ☐ 441 Voting
☐ 442 Employment
☐ 443 Housing
☐ 444 Welfare
☐ 440 Other Civil Rights
☐ 445 Amer w/ disab - Empl
☒ 446 Amer w/ disab - Other
☐ 480 Consumer Credit
☐ 490 Cable/Satellite TV

PRISONER PETITIONS

- ☐ 510 Motion to Vacate
Sentence Habeas Corpus:
☐ 530 General
☐ 535 Death Penalty
☐ 540 Mandamus & Other
☐ 550 Civil Rights
☐ 555 Prison Condition

VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT
CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

42 U.S.C. Sections 12101-12102, 12181-12183, and 12201, Et. Seq.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ ☐ CHECK YES only if demanded in complaint:
UNDER F.R.C.P. 23 JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE
IF ANY "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)

(PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND☐ SAN JOSE

DATE 2/16/06 SIGNATURE OF ATTORNEY OF RECORD

David C. Wakefield